NOTES AND COMMENTS ON RECENT DECISIONS.

In the February number of the AMERICAN LAW REGISTER AND REVIEW, in a note to Railway Co. *v.* Spencer, the English cases of Rayner *v.* Preston, and Castellain *v.* Preston, were cited and discussed. I think that Raynor *v.* Preston, is good law in New York, and ought to be good law everywhere.

Castellain v. Preston, I am not very well satisfied with. In the first place, its conclusion is not demonstrated to be consistent with the doctrine of indemnity. It proceeds upon the notion that the value of the property at the time of the fire, must be the same as its value at the time of the execution of the executory contract to sell. This may not have been so. There was in that case a two year period within which to exercise option to complete sale. But a more serious objection is this. An executory contract to sell a house and lot in future is not a present sale, and, until the time comes for closing title, the vendor, who is still the owner, would seem to have the right to reap the advantage of pending contracts with third parties relating to his property. When the time for closing title arrives, the vendee is entitled to receive substantially what he has contracted for. If the house has meanwhile burned down, or has been substantially injured or destroyed by fire, it does not seem to me that the vendee is legally obligated to take the property under the usual executory contract of sale.

And this position is not without warrant of authority, and has been expressly held in New York. Listman *v.* Hickey, N. Y. Law Journal, p. 1249, Feb. 20, 1892; Smith *v.* McCluskey, 45 Barb. 610; Goldman *v.* Rosenberg, 116 N. Y. 78; Smyth *v.* Sturges, 108 N. Y. 492. If the vendee chooses to complete the purchase, he does so because he considers the property still worth the purchase price. If the

vendor cannot compel a purchase, there is no legal right in his favor to form a basis for subrogation in favor of the insurance company. Moreover, the rule in Castellain *v.* Preston, would not work well in practice. To compel the parties to a future executory contract to complete as matter of legal obligation when both of them prefer to cancel before the time for closing would be manifestly inconvenient. But if the law permitted them to cancel their executory contract, they would, by consent, do this upon the occurrence of the fire, in order to compel the insurers to pay the loss, provided, Castellain *v.* Preston, were good law. After cancelling the subsisting contract of sale, a new contract of the same tenor and effect might immediately be substituted under which it could not be claimed that the insurance company would have any right of subrogation to the purchase price.

The insurance contract is, in its terms, an agreement to pay to the vendor the cash value of his property destroyed. The starting point and presumption should be, that the contract is to be enforced according to its express terms unless a clear consideration of public policy intervenes, and where the assured has respected the doctrine of the necessity of an insurable interest at the time of the issuance of the policy, and also during its entire life it is hardly worth while to press the doctrine of indemnity any further. According to Castellain *v.* Preston, the insurers may receive premiums for nothing, though no condition of the contract has been violated by the insured; and this result is in itself inequitable.

The strict doctrine of indemnity has for convenience been abandoned in the law of life insurance on this account. Nor is it uniformly applied in the law of fire insurance in accordance with the rigid rules laid down in Castellain *v.* Preston. In proof of this, many cases might be cited from the English and American reports: Blackstone *v.* Alemahnia Ins. Co., 56 N. Y. 104; Mut. Safety Ins. Co. *v.* Hone, 2 Comst. (N. Y.) 235; Collingridge *v.* Royal Exchange Ins. Co., 3 Q. B. D. 173; Seymour *v.* Vernon, 21 L. J. Ch. 433; Burnard *v.* Rodocanachi, 7 App. Cas. 333, 339.

In fact, in Castellain *v.* Preston, the learned justices seem to

be avowedly struggling throughout their opinions with the many legal obstacles with which they have to contend.

A contract to sell in future is not a sale within the meaning of the policy: Browning *v.* Home Ins. Co., 71 N. Y. 508; Ayres *v.* Hartford Fire Ins. Co., 17 Iowa, 176; Hill *v.* Cumberland Valley M. P. Co., 59 Penn. St. 474.

And until title passes, it is convenient to consider the vendor's relations to his insurance contracts undisturbed.

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CASES ON WILLS.

As cosmopolitain habits increase in popularity, the decisions upon the probate of foreign, or partially foreign wills and codicils, become of greater importance, particularly where the will of the testator is contained in more than one document. The question of incorporations in the probate of separate documents, has frequently troubled the courts, especially the probate of separate and distinct wills disposing of property in a different country from that in which the general will of the testator is offered for probate. The Probate Division of the High Court of Justice in England, were recently confronted with a most peculiar state of facts, *In re Goods of Tampui* [1894] P. 39. Testator domiciled in England, left a will with two codicils, disposing of his property in England and Russia, and also two other instruments, one a will, revoking all previous dispositions so far as they related to his real property in Russia, and appointing separate executors of that property. All the executors and trustees united in applying for probate in England of the five instruments. The Russian will was not executed in accordance with Russian law, and it was hoped that, if admitted in England, the domicile of the testator, the probate might be recognized in Russia as covering the realty. The court refused to allow the will relating to the Russian real property to be included in the probate, since that would be the same as saying that a will dealing only with English personalty, and a will dealing only with English realty, ought both to be

admitted to probate, because, forming together a disposition of the whole property of the testator. No case, it was asserted, could be cited to that effect. The point, however, was regarded as important, and an appeal probable. In the cases where the courts have not insisted upon the probate of all the separate testamentary papers, they have done so as a concession to the convenience of the parties in interest: *In the Goods of Astor*, 1 P. D. 150. A concession in the case *of the Goods of Tampui*, would have been a matter of great practical convenience, certainly it has been the invariable custom to require some memorandum to be attached to the general will probated of the document relating to the foreign goods, so that any one looking at the probate may be at once apprised of the existence of such other paper.

The well established rule in Pennsylvania that no testator is presumed to die intestate as to any part of his property, if the words of the will can be construed to carry the whole, is forcibly illustrated and confirmed in Reimer's Estate, 28 Atlantic, 186. The clause in dispute contained the words, "I give to my brother Andrew all my household goods, books, clothing, furniture, etc., that he may desire. The balance o the personal effects to be divided among the children of my sister." The Orphans' Court decided that the words " balance of personal effects," referred only to the goods mentioned in the bequest to Andrew, and did not include a large residue o personal property, consisting of cash and securities. This decision the Supreme Court has reversed, giving the clause the broadest possible construction, and the word, "effects," the widest possible meaning, holding in fact, that the sentence is residuary in its character. Justice Dean, in dissenting, took the view that the words, personal effects, were restricted by the context, and that the intentions of the deceased could be plainly ascertained.

In cases of the construction of ambiguous phrases in wills, arguments from precedents are nearly useless, for no two cases are alike. The maxim that no testator is presumed to die intestate as to a part of his goods, if the words will carry the whole is so often and so triumphantly quoted in recent deci-

sions, that it may be regarded as a ready and useful *Deus ex machina* for relieving a distracted bench.

The Supreme Court of Errors of Connecticut, has had occasion, in the recently reported *In re Barber's Estate*, 27 Atlantic, 973, to consider the ever recurring question of testamentary capacity and the exhaustive character of the opinion delivered will, it is to be hoped, not only end the discussion in that state, but also be of service in other jurisdictions. The court had to dispose of a wordy and ponderous charge to the jury, containing statements to the effect that the burden of proof lies in every case, and remains throughout the trial upon the proponents of the will. That the burden upon the proponents is not that of proof by a fair preponderance, but by such evidence as brings certainty to the minds of the jury. And that to defeat a will on the ground that it is the product of an insane delusion, the jury should be satisfied by a preponderance of evidence of the existence and effect of such a delusion. These statements were certainly calculated to confuse a jury. The Supreme Court, however, reviews the whole subject of the burden of proof in cases involving testamentary capacity, finding an irreconciliable conflict of views and opinions. The present tendency is to hold that, on formal proof of capacity by the attesting witnesses, the burden of proof upon the proponents has been discharged, and thereafter rests upon the party alleging incapacity. If the opinions of the attesting witnesses are favorable, the court concludes, the contestant will go forward with affirmative evidence of insanity, and proponent will rebut, there being always a presumption in favor of sanity, which must be counterbalanced by a preponderance of evidence. It is hardly necessary to discuss the deplorable situation of the proponent, should the opinions of the attesting witnesses prove unfavorable. The interesting topics touched upon in this case are hypothetical questions, expert testimony and the admissibility of letters addressed to testator and found among his papers.

W. H. Loyd.

SOME RECENT CASES ON RAILROAD LEASES.

Whatever may be the advantages of railroad consolidation from an economic point of view the tendency of legislation and judicial decision is to limit it as far as practicable. The object, of course, is to prevent the growth of monopolies, by hindering the formation of systems of railroads which will virtually control vast regions of country to the exclusion of all competition. There are numerous constitutional and statutory provisions which forbid the consolidation of parallel and competing lines; and the courts are always ready to scrutinize closely any attempt at consolidation where there is no legislative authority for it. The rule seems to be that, where a railroad company is granted a franchise, intended in a large measure to be exercised for the public good, the due performance of its franchise being the consideration of the public grant, any contract which disables the corporation from performing those functions, without the consent of the state, and tranfers to others the rights and powers conferred by the charter, relieves the grantees of the burden which the charter imposes, is a violation of the contract with the state, and is void as against public policy. This rule was applied in the very recent case of Earle *v.* Seattle, L. S. & E. Ry. Co., 56 Fed. Rep. 909 (June, 1893), where a railroad company organized under the laws of Washington, attempted to consolidate with another company by a traffic agreement, which involved the surrender of the entire control and management of its affairs for its legal lifetime. Under the laws of Washington a railroad company has no authority to transfer its franchise except by sale and conveyance and lease in a manner prescribed by the statute. The court held that the traffic agreement was involved and should be set at the suit of the minority of the stockholders.

In Stockton, Attorney General *v.* Central R. R., of New Jersey, 24 Atl. Rep. 964 (1892), the court approved the doctrine that even where a railroad company was given the power to lease, that power impliedly, from the character of railroad corporations as *quasi* public bodies, was limited to

leases designed for the public welfare, and did not warrant a lease in furtherance of a scheme to prevent competition, and create a monopoly. The decision of the case did not turn upon this proposition, but the lease complained of was set aside, because it had been made to a foreign corporation, for which there was not only no legislative authority but an actual legislative prohibition.

In Oregon, where there is no statute which authorizes either expressly or by implication a railroad lease, such lease has been held absolutely void: Oregon Ry. & Nav. Co. *v.* Oregonian Ry. Co., 145 U. S. 52. See also on this subject Hamilton *v.* Savannah F. & W. Ry. Co., 49 Fed. Rep. 412.

Statutory prohibition against leases of competing lines are strictly construed against companies which attempt to evade them. Thus in Hafer *v.* Cincinnati H. & D. R. Co., 29 Wkly. Law Bul. (Ohio) 68 (1892), it was held that a railroad was competing within the meaning of the Ohio statute, though the competing points were reached by trackage arrangements with other lines. In Hamilton *v.* Savannah, F. & W. Ry. Co., 49 Fed. Rep. 412, it was held that the purchase of one railroad by another was illegal under the constitutional provision which forbade one corporation to make any contract with another tending to defeat or lessen competition in their respective business. If a railroad company is authorized to lease another railroad connected with it, the authority must be restricted to railroads that are finished: Pittsburg & Connelsville R. R. *v.* Bedford & Bridgeport R. R., 32 P. F. Smith (Pa.), 104.

Legislative authority to make a traffic arrangement with another railroad does not imply a power to lease. In St. Louis V. & T. H. R. R. Co. *v.* Terre Haute & I. R. R. Co., 12 S. Ct. 953 (1892), it appeared that an Indiana statute, authorized any railroad company of Indiana "to intersect, form and unite" with any railroad of an adjourning state constructed to the state line, and "to make such contracts and agreements with any such road . . . for the transportation of freight and passengers, or for the use of its road, as to the board of directors may seem proper. The court held that this

statute did not authorize one railroad corporation to lease its road to another.

In Thomas *v.* West Jersey R. R., 101 U. S. 71, it was held that, where a railroad company is authorized to make contracts with other corporations and individuals for transporting or conveying passengers and merchandise, it cannot make a lease to three individuals by which all its rights and duties are transferred to them for twenty years.

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